MOTION FILED
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No. 81-5189

In the Supreme Court of the United States

October Term, 1981

GEORGE MERCER, *Petitioner,*

vs.

STATE OF MISSOURI, *Respondent.*

MOTION FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Amicus adopts petitioner's first and third questions presented for review and adds the following question: Should this Court overrule *Gregg v. Georgia*, 428 U.S. 153 (1976)?

INDEX

Questions Presented for Review 1
Statement of the Case 3
Reasons for Granting the Writ:
1. The Missouri Supreme Court Decided Two Federal Questions of Substance in a Way Not in Accord With Applicable Decisions of This Court 4
   A. The Missouri Supreme Court Upheld the Trial Court's Exclusion of Veniremen Who Did Not State Unambiguously That Their Personal Opposition to Capital Punishment Would Keep Them From Following the Court's Instructions to Consider Capital Punishment 4
   B. The Court Below Applied Such a Vague and Broad Construction of Missouri's Death Penalty Statute That No Limits Were Imposed on the Arbitrary and Capricious Infliction of the Penalty in Violation of *Godfrey v. Georgia*, 446 U.S. 420 (1980) 7
2. This Court Should Grant Review to Overrule Its Decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), Because This and Other Cases Demonstrate That Our Criminal Justice System Is Unable to Eliminate Arbitrariness in the Infliction of Capital Punishment and Therefore the Death Penalty Violates the Eighth and Fourteenth Amendments 13

Conclusion 14
Appendices (Consent of counsel for the parties to filing this brief) 15

Citations

Adams v. Texas, 448 U.S. 38 (1980) 5, 6
Boulden v. Holman, 394 U.S. 478 (1969) 5
Davis v. Georgia, 429 U.S. 122 (1976) (per curiam) 5
Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) 7, 10, 14
Garner v. Louisiana, 368 U.S. 157 (1961) 10
Godfrey v. Georgia, 446 U.S. 420 (1980) 7, 8, 9, 10, 13
Gregg v. Georgia, 428 U.S. 153 (1976) 7, 8, 13
Mahler v. Tieman, 550 S.W.2d 623 (Mo. App. 1977) 11
Marion v. Beto, 434 F.2d 29 (5th Cir. 1970) 5
Martin v. Mercantile Trust Co., 293 S.W.2d 319 (Mo. 1956) 11
Maxwell v. Bishop, 398 U.S. 262 (1970) 5
Proffit v. Florida, 428 U.S. 242 (1976) 7
Southern Pacific Transportation v. Continental Shippers Association, Inc., 485 F. Supp. 1313 (W.D. Mo. 1980) 11
State v. Mercer, 618 S.W.2d 1 (Mo. banc 1981) 5, 6, 7, 9, 10, 11, 12
Thompson v. Louisville, 362 U.S. 199 (1960) 10
Witherspoon v. Illinois, 391 U.S. 510 (1968) 4, 5, 6
Woodson v. North Carolina, 428 U.S. 280 (1976) 7-8

Miscellaneous

Mo. Rev. Stat. § 565.012 8
Mo. Rev. Stat. § 565.014 ..... 3, 10, 12
Missouri Approved Instructions 13.01 to 13.06 (3rd ed. 1981) 11

No. 81-5189

In the Supreme Court of the United States

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GEORGE MERCER, *Petitioner,*

vs.

STATE OF MISSOURI, *Respondent.*

MOTION FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME

The American Civil Liberties Union of Western Missouri hereby respectfully moves for leave to file the attached Brief in Support of Petitioner's Petition for Writ of Certiorari out of time. Counsel for the parties consent to the filing of this Brief, but counsel for *amicus* were unable to prepare it within the time allotted by the rules of this Court.

Amicus opposes the imposition of the death penalty under any circumstances, but particularly under the circumstances of this case. The arguments to be presented in this Brief are supplementary to, but not redundant of, the arguments made by Petitioner.

Counsel for *amicus* were not familiar with the issues raised in this petition until several weeks after the Missouri Supreme Court rendered its opinion. Counsel then had to study the issues raised and to conduct their own

research, due to the importance of the questions raised in this Court.

The Brief could not be filed in time because counsel for *amicus* could only work on this Brief outside the working hours of the private law firm by which they are employed as associates. Counsel have made a diligent effort to provide this Brief to the Court and parties as soon as possible.

For these reasons, this Court should grant leave to file this *amicus* brief out of time.

Respectfully submitted,

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No. 81-5189

In the Supreme Court of the United States

October Term, 1981

GEORGE MERCER, *Petitioner,*

vs.

STATE OF MISSOURI, *Respondent.*

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WESTERN MISSOURI IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The American Civil Liberties Union of Western Missouri supports petitioner's petition for writ of certiorari. Counsel for both petitioner and respondent have consented to the filing of this *amicus* brief. Letters confirming that consent are attached to this brief as Appendices A and B.

STATEMENT OF THE CASE

Amicus adopts petitioner's statement of the case and adds the following information:

Petitioner is the first person to be convicted of capital murder and sentenced to death under Mo. Rev. Stat. §§ 565.008 to 565.014 (1978), whose conviction and sentence therefore have been affirmed by the Missouri Supreme Court. This is the first case challenging Missouri's new death penalty statute to reach any federal court. If his conviction and sentence stand, petitioner will be the first person to die in Missouri's gas chamber in more than 16 years.

The Missouri Supreme Court was aware of the importance of its decision and the likelihood that this Court would be reviewing the sentence of death imposed on petitioner. The factual statement of the majority opinion is more inflammatory than the statement presented in the Missouri Attorney General's brief to that Court, and seems more preoccupied with the language used by petitioner during the crime than with the facts of the offense. The tone of the Court's opinion below—more reminiscent of the National Enquirer than the Southwestern Reporter—suggests that it is a rationalization of the sentence imposed by the jury rather than a reasoned and dispassionate analysis of the requirements of the United States Constitution and Missouri law.

REASONS FOR GRANTING THE WRIT

1. THE MISSOURI SUPREME COURT DECIDED TWO FEDERAL QUESTIONS OF SUBSTANCE IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Missouri Supreme Court Upheld the Trial Court's Exclusion of Veniremen Who Did Not State Unambiguously That Their Personal Opposition to Capital Punishment Would Keep Them From Following the Court's Instructions to Consider Capital Punishment.

In *Witherspoon v. Illinois*, 391 U.S. 510, 522-23 (1968), this Court held that a person could not be put to death if the jury which imposed or recommended capital punishment had been stripped of all veniremen who expressed "conscientious or religious scruples" against the death penalty. Subsequent decisions of this Court have reaffirmed this holding unanimously and established that veniremen

in a capital case cannot be struck for cause for their beliefs on the death penalty unless they make it "unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them . . . ." *Id.* at 522-23 n.21. *See Adams v. Texas*, 448 U.S. 38, 43-45 (1980); *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam); *Maxwell v. Bishop*, 398 U.S. 262, 269 (1970); *Boulden v. Holman*, 394 U.S. 478, 483-84 (1969).

Any doubts are to be resolved against exclusion. *Witherspoon, supra*, 391 U.S. at 515-16 n.9; *Marion v. Beto*, 434 F.2d 29, 31 (5th Cir. 1970). If even one prospective juror is excluded in violation of *Witherspoon*, "any subsequently imposed death penalty cannot stand." *Davis v. Georgia*, 429 U.S. 122, 123 (1976) (per curiam).

In this case, the trial court excluded five veniremen on the basis of their personal beliefs without insisting that the jurors state unequivocally that they could not follow the Court's instructions to consider the death penalty. *See State v. Mercer*, 618 S.W.2d 1, 16 (Mo. banc 1981) (Seiler, J., dissenting). Despite the ambiguity of the transcribed voir dire examinations, the Missouri Supreme Court ignored this Court's directive to resolve doubts in favor of exclusion and demonstrated its misunderstanding of *Witherspoon* by its rationalization of the trial judge's ruling.

The Court below attempted to defend petitioner's sentence by lamely suggesting that "[i]n light of the trial court's stated understanding of the limited excuse, its ability to observe the tenor of the questioning and the frequent reluctance of lay persons to communicate their deep-seated opinions in a cogent and emphatic manner, it can only be said that the requirements of *Witherspoon* . . . were met."

State v. Mercer, 618 S.W.2d 1, 7 (Mo. banc 1981). These alleged "factors" have never before been recognized by this Court.

The language of the opinion below, particularly its reference to "the limited excuse," demonstrates the breadth of the Missouri Supreme Court's misunderstanding of *Witherspoon*. In *Adams v. Texas*, 448 U.S. 38, 47-48 (1980), this Court instructed

> that Witherspoon is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. . . . [I]t is apparent from their frequent references to Witherspoon as a ground for "disqualifying" prospective jurors that the State, and the Texas Court of Criminal Appeals, might have fallen into the error of assuming that Witherspoon . . . [is] grounds for exclusion. . . .

Id. (Citations and footnotes omitted). The Missouri Supreme Court's repeated references to the "excuse" evidences the same flawed understanding of *Witherspoon* and its progeny that sparked reversal of the death sentence imposed upon Adams in *Adams v. Texas, supra.*

None of the five challenged jurors who are the focus of attention here said "I can't follow the Court's instructions" in the unambiguous terms previously required by this Court. The inadequacy of questioning by the prosecutor and trial court reflected in the transcript cannot be saved by a *post hoc* suspicion that the trial judge understood this Court's rulings and had the "ability to observe the tenor of the questioning" or by the fear that lay people cannot express themselves with precision.

This Court's prior rulings require the prosecutor and trial Court to insist upon precision of response when death is the penalty. *See State v. Mercer*, 618 S.W.2d at 16 (Seiler, J., dissenting) ("[I]t is not the proper duty or function of a trial court or this court to 'interpret' [an equivocal, ambiguous an uncertain] phrase by resolving the doubt in favor of the State when a man's life is at stake. . . ."). Because the Missouri courts have misapplied *Witherspoon* and its progeny, petitioner's Sixth and Fourteenth Amendment rights have been violated and this Court should review this case.

B. The Court Below Applied Such a Vague and Broad Construction of Missouri's Death Penalty Statute That No Limits Were Imposed on the Arbitrary and Capricious Infliction of the Penalty in Violation of Godfrey v. Georgia, 446 U.S. 420 (1980).

Missouri's death penalty statute is roughly patterned after the Georgia statute approved by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976). However, since *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), a majority of this Court has condemned the imposition of capital punishment "under sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. at 188.

Specifically, Missouri "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (footnotes omitted), *quoting Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Proffit v. Florida*, 428 U.S. 242, 253 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); and *Woodson v.*

North Carolina, 428 U.S. 280, 363 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

In this case, the jury was instructed to return the death penalty against defendant if it found at least one of two statutory aggravating circumstances. The first aggravating circumstance was that "the offender . . . committed capital murder as an agent or employee of another person." *See* Mo. Rev. Stat. § 565.012.2(6).

The second aggravating circumstance submitted to the jury was derived from § 565.012.2(7). The jury was instructed that it could return the death penalty if "[t]he murder . . . involved depravity of mind and that as a result thereof it was outrageously vile and inhuman."[1]

i. The submission of the aggravating circumstance that the offense involved "depravity of mind" was so vague as to violate petitioner's rights under the Eighth and Fourteenth Amendments.

In *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980), this Court reversed "a sentence of death based on no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' " In this case, petitioner has been sentenced to death because of a jury finding that

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1. Section 565.012.2(7) provides that the death penalty may be imposed if "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind." This aggravating circumstance is not the same as that contained in the Georgia statute approved in *Gregg v. Georgia*, 428 U.S. 153 (1976), and as interpreted by the Supreme Court in *Godfrey v. Georgia*, 446 U.S. 420, 431 (1980). Missouri's death penalty statute contains no reference to aggravated battery, while aggravated battery is part of this aggravating circumstance in Georgia's statute.

In this case, the State conceded that no torture was involved. *See* the State's Brief to the Missouri Supreme Court at 50. Thus, the only standard given to the jury in the instructions was that the offense "involved depravity of mind and that as a result thereof it was outrageously vile and inhuman."

the murder he was found to have committed "involved depravity of mind and that as a result thereof, it was outrageously or wantonly vile and inhuman." The addition of the phrase "depravity of mind" cannot save such inherently ambiguous language from constitutional attack based on *Godfrey*.

This Court has rejected "[t]he standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury" because

> [t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman' . . . [T]he trial judge's sentencing instructions . . . gave the jury no guidance concerning the meaning of [these] terms. In fact, the jury's interpretation of [this aggravating circumstance] can only be the subject of sheer speculation.

Id. at 428-29.

The Court below tried to justify the jury's standardless finding in this case by highlighting parts of the evidence at trial and announcing that "'[d]epravity of mind' is demonstrated in this case by the mode of killing preceded by extended sexual and psychological abuse of the victim." *State v. Mercer*, 618 S.W.2d at 11.[2]

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2. The majority opinion then cites a Georgia case, *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339, 345-46, *cert. denied*, ... U.S. ....., 100 S. Ct. 958 (1980). The Court below thus implies that it has adopted Georgia's standards defining "depravity of mind" in this aggravating circumstance.

However, this Court should not be so misled. In *State ex rel. Westfall v. Mason*, 594 S.W.2d 908, 917 (Mo. banc 1980), the Missouri Supreme Court declared that it "would decline to fol-

(Continued on following page)

Except for this *post hoc* label, the Missouri Supreme Court has never defined depravity of mind and made no attempt to do so in this case. Without specific and reviewable instructions to the jury, Missouri cannot guarantee that the death sentence here was "based, on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977), *quoted in Godfrey v. Georgia*, 446 U.S. 420, 433 (1980).

ii. There was no evidence of agency sufficient to support submission to the jury of the first aggravating circumstance and the jury was given no instructions defining agency.[3]

A conviction devoid of evidence violates due process. *See Garner v. Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. Louisville*, 362 U.S. 199, 204-05 (1960). Similarly,

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Footnote continued—

low the Georgia Court in the construction of Missouri's death penalty statutes."

The majority below ignored Georgia's ruling in *Holton v. State*, 243 Ga. 312, 253 S.E.2d 736, 740, *cert. denied*, 444 U.S. 925 (1979) ("It is unlikely that a statutory aggravating circumstance which consisted solely that the murder involved depravity of mind would survive a constitutional challenge based on *Furman v. Georgia*, 408 U.S. 238 (1972), [because] such an aggravating circumstance could be so broad as to allow the death penalty to be imposed at random in any murder case"), but adopted the holding of *Berger v. State*, 245 Ga. 458, 265 S.E.2d 796, 800, *cert. denied*, 446 U.S. 988 (1980) (failure of one aggravating circumstance does not invalidate the death penalty where other aggravating circumstances are upheld), despite substantial authority to the contrary. *See State v. Mercer*, 618 S.W.2d at 10 n.5 and cases cited. A cynic might suggest that Missouri only follows Georgia when her sister state's rulings lead to the gas chamber.

3. In its brief in opposition to the petition for a writ of certiorari, the State notes that this point was not argued before the Missouri Supreme Court. However, review of the evidentiary basis for an aggravating circumstance is mandated by Mo. Rev. Stat. § 565.014.3(2), and the Court below summarily stated that "the evidence supports the jury's findings on both aggravating circumstances. . . ." *State v. Mercer*, 618 S.W.2d at 10 n.5.

in this case, there was no evidence that petitioner was acting as the agent of another person in the commission of the murder. *See State v. Mercer*, 618 S.W.2d at 18 (Seiler, J., dissenting).

The State rests its agency case on a verbal exchange between petitioner and his friend Steven Gardner. According to the State, after petitioner raped the victim he rhetorically asked what he should do with her, and Gardner off-handedly replied "kill the bitch."

In finding this almost meaningless exchange constituted an agency relationship, the Court below ignored long-standing principles of Missouri law that require the principal to have control over the agent before an agency relationship can exist. *See, e.g., Martin v. Mercantile Trust Co.*, 293 S.W.2d 319, 325 (Mo. 1956); *Mahler v. Tieman*, 550 S.W.2d 623, 628 (Mo. App. 1977); *Southern Pacific Transportation v. Continental Shippers Association, Inc.*, 485 F. Supp. 1313, 1316 (W.D. Mo. 1980).

Moreover, the jury in this case was given no definition of agency. No such instruction exists in Missouri's pattern criminal instructions, and the trial judge made no attempt to define "agency" by quoting from the cases cited above or by modifying various civil instructions on agency. *See generally*, Missouri Approved Instructions 13.01 to 13.06 (3rd ed. 1981).

When an aggravating circumstance is submitted to the jury without evidence or definition, it is unconstitutionally vague and cannot support the sentence of death imposed by the jury.

iii. The Missouri Supreme Court violated the Eighth and Fourteenth Amendments by abdicating its responsibility to compare petitioner's crime to that of

other convicted murders to ensure that the death penalty was not arbitrarily or capriciously imposed in his case.

Mo. Rev. Stat. § 565.014.2(3) mandates that the Missouri Supreme Court must determine "[W]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." The majority compared petitioner's sentence only to cases in which the death penalty and life imprisonment were submitted to the jury and which were affirmed on appeal. *State v. Mercer,* 618 S.W.2d at 11.

The majority's narrow basis of comparison virtually assures that the death penalty will be approved by the Missouri Supreme Court. Its categorization ignores several classes of cases—those in which the prosecutor obtained a guilty verdict and then waived the death penalty, those in which life imprisonment was imposed but no appeal was taken, and all cases in which capital murder was charged but in which the jury found the defendant guilty of a lesser crime. In many of these cases, gruesome, atrocious, or "depraved" crimes were committed but the death penalty was not imposed. *State v. Mercer,* 618 S.W.2d at 20-21 (Seiler, J., dissenting).

When those cases are added to the calculus, it becomes clear that many Missouri juries have refused to authorize the death penalty in circumstances which rational reviewers would label more "depraved" than those of petitioner's crime in this case. *See State v. Mercer,* 618 S.W.2d at 21-22 (Seiler, J., dissenting). Without detailed standards and rigorous review, capital punishment is thus no more than the whim and caprice of a prosecutor and various sets of twelve jurors sanctified by the imprimatur of a majority of the Missouri Supreme Court.

Because of the importance of these issues, this Court should grant the petition for a writ of certiorari to the Missouri Supreme Court and reverse this case.

2. THIS COURT SHOULD GRANT REVIEW TO OVERRULE ITS DECISION IN GREGG v. GEORGIA, 428 U.S. 153 (1976), BECAUSE THIS AND OTHER CASES DEMONSTRATE THAT OUR CRIMINAL JUSTICE SYSTEM IS UNABLE TO ELIMINATE ARBITRARINESS IN THE INFLICTION OF CAPITAL PUNISHMENT AND THEREFORE THE DEATH PENALTY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Since rejecting a facial challenge to Georgia's death penalty statute in *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court has been deluged with dozens of challenges to the application of the death penalty statutes of Georgia and many other states which model their capital punishment law on that enacted by Georgia. The multitude of challenges to these statutes as applied demonstrates to this Court that "the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system." *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring). It is time for this Court to "conclude that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether." *Id.*

This case demonstrates the burden, if not the inevitable failure, of the task this Court has set for itself. Despite this Court's clear holdings, the trial judge gave no instructions defining the word depravity, thereby allowing the jury to impose the death penalty in its un-

controlled discretion. The Missouri Supreme Court abandoned its statutorily and constitutionally imposed duty of reviewing the sentence, apparently because five members of the Court below felt the petitioner should be put to death.

While this Court can remedy the injustice of capital punishment in this case and in any other individual case brought before it, it cannot review every sentence of death imposed. Nine years after *Furman* and five years after *Gregg*, the death penalty still "is exacted with great infrequency for the most atrocious crimes [without] meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *See Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). It is time for this Court to abandon these efforts, overrule *Gregg*, and hold that the death penalty violates the Eighth and Fourteenth Amendments.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Missouri Supreme Court in this case.

Respectfully submitted,

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APPENDIX A

C. John Lozano
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September 14, 1981

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Mr. Floyd R. Finch, Jr.
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Re: George Mercer v. State of Missouri, No. 81-5189,
United States Supreme Court, Petition for Writ of Certiorari

Dear Mr. Finch:

In behalf of my client and myself we welcome your assistance in this matter and do hereby give our consent to you to appear as amicus curiae on behalf of petitioner, George Mercer, in the above-entitled cause.

Yours very truly,

Cenobio Lozano Jr.

Cenobio Lozano, Jr.

CLJ:bc

APPENDIX B

Attorney General of Missouri
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(314) 751-3321

August 6, 1981

Mr. Floyd R. Finch, Jr.
Blackwell, Sanders, Matheny, Weary
& Lombardi
Suite 600, 2480 Pershing Road
Kansas City, Missouri 64108

Re: George Mercer v. State of Missouri,
No. _____, United States Supreme Court,
Petition for Writ of Certiorari.

Dear Mr. Finch:

Pursuant to our telephone conversation of August 5, 1981, the State of Missouri gives its consent for you to appear as an amicus curiae on behalf of the petitioner in the above-entitled petition for writ of certiorari.

Also find enclosed a copy of the petition which was sent to me by the attorney for the petitioner.

Sincerely yours,

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Assistant Attorney General

clc
Enclosure
cc: Cenobio Lozano, Jr.
Attorney for Petitioner